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Edward B. Hayes

ENTITLED War Powers of President Lincoln
and President Wilson

IS APPROVED BY ME AS FULFILLING THIS PART OF THE REQUIREMENTS FOR THE

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H. S. Robertson

Instructor in Charge

APPROVED: Samuel M. Larson

HEAD OF DEPARTMENT OF History

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WAR POWERS
OF
PRESIDENT LINCOLN AND
PRESIDENT WILSON

BY

EDWARD BEAN HAYES

THESIS

FOR THE

DEGREE OF BACHELOR OF ARTS

IN

HISTORY

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CONTENTS

Page

I

Introductory	1
--------------------	---

II


The War Powers of President Lincoln	4
---	---

III

The War Powers of President Wilson	21
--	----

IV

Comparisons and Conclusions	51
-----------------------------------	----



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The facts studied in the case of President Wilson being
contemporary history, there are no secondary accounts.



CHAPTER ONE

INTRODUCTORY

When the writer began this paper there was not in existence an easily available account of the powers that have been exercised by American Presidents in the time of war. Americans remember occasionally some striking statement concerning the authority exercised by President Lincoln, such as that made by Lord Bryce and quoted, with endorsement, by James Ford Rhodes, that "Abraham Lincoln wielded more authority than any single Englishman has done since Oliver Cromwell." And there is current today a very well-founded conviction that powers of the greatest and most far-reaching character have been entrusted to Woodrow Wilson and his administration. But very few know or could easily find out just what these war-powers of American Presidents are and what form they have taken in the past and are taking today. This paper is an attempt to furnish such an account.

It is often claimed by historians, that a study of the past furnishes the perspective which is necessary to a proper interpretation of the present. This is an application, and it is hoped, a vindication of this claim.

This particular subject of comparison is interesting just now for a special reason. It is one of the tenets of political and historical orthodoxy that in executive administration, democracy is less efficient than monarchy or empire. And probably evidence could be found in the past to pretty well substantiate this principle. If it is true that democracy is bound by its inherent nature to a certain degree of inefficiency, then that is a cause for deep regret to a na-

* Bryce, American Commonwealth, vol. 1, page 61.

* Rhodes, History of the United States, vol. 1V, page 165.

tion which is so committed to democracy as this one. It is worth while, perhaps, to remember that because inefficiency has characterized democracies in the past, it does not follow from that evidence alone that it always and inevitably will do so in the future. The bases for which democrats can hope, on which to rest a faith in the possibility of a thoroughly efficient democratic state, are first, the fact that theirs is a comparatively new form of government; that while empires and monarchies have for many centuries been learning to meet the exigencies that confront states, and can draw upon the lessons of a long past, modern democracy (which is as different from those early experiments in Greece as a man is different from a protozoan) is a creation of the last hundred years. And secondly, he has a sure ground for hope, if during its brief existence, there has been great and continuous increase in the executive efficiency of democratic governments. The present study throws some light on the latter question. The executive efficiency, or inefficiency, manifested by democracy in the trial of war will go far toward bringing out its latent possibilities of this sort.

There are two bases on which the war powers of an American President should properly be classified. These are first, the source from which the power is derived, and according to this the following groupings are possible: 1) Powers granted by act of Congress under the Constitution, 2) Powers granted by the Constitution, 3) Extra-legal and extra constitutional powers, 4) Illegal and unconstitutional powers. The other basis for classification is the nature of the powers themselves, and here five groups can be made. 1) Military, 2) Industrial and Commercial, 3) Financial, 4) Political, 5) Police. Of course, military powers mean only those pertaining directly to the control of the armed land and naval forces. Many other than strictly

military powers are exercised on the ground of military expediency--even the Emancipation Proclamation was announced as a military measure.*

With this much introduction, this paper will describe, first, the war powers of President Lincoln, then the war powers exercised by President Wilson, up to date, indicating where each falls in the two classifications of war powers suggested. It will then proceed to comparisons and conclusion.

* The first paragraph of the Proclamation speaks of the measure which it orders as a "fit and necessary war-measure for suppressing rebellion." Richardson, Messages and Papers of the Presidents, volume VI, page 157.

CHAPTER TWO

WAR POWERS OF PRESIDENT LINCOLN

Let us consider first the war powers of President Lincoln as granted directly by the Constitution. The Constitution of the United States makes the following provisions as to the power of the executive in the conduct of war and regulation of military establishments:

Article 1 section 1. "The executive power shall be vested in the President of the United States of America."

Article 1 section 2. "The President shall be the commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States...and he shall have power to grant reprieves and pardon for offenses against the United States, except in cases of impeachment."

Article 1 section 3. "He (the President) shall from time to time give to the Congress information on the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient."

The first requires an act of Congress as a rule to make it effective, and the last amounts to very little unless the formal messages to Congress can be backed by effective personal dealing with Senators and Congressmen, and therefore it will be taken up under the Presidents extra-legal and extra-constitutional powers.

The functions of the President as commander-in-chief of the army and navy are somewhat peculiar. It is highly probable that the purpose of the framers in making this arrangement was less to constitute the President the field-marshal who should direct the course of military operations against the enemy in ordinary warfare, than to

make the American army the President's army, as the English army was the King's army, with the purpose of assuring themselves through such a personal union of civil and military power, that no general would ever arise like the duces of declining Rome, to seize control of the State with armed forces. The business of fighting is a highly technical affair, distinctly a field for those who combine expert training and first class natural ability of this peculiar kind. That Presidents elected from civil life on political issues should always be fit for actual military command is hardly what veteran warriors and keen-sighted statesmen like Washington and Franklin, for instance would have counted on.

As a matter of fact the actual military functions of our war-Presidents have been chiefly limited to the appointment and removal of generals who direct the fighting. Lincoln's long experimentation with different army-masters is too well known to need comment. He was far too wise to interfere often with field operations. In the case of his violent disagreement with Grant about the way to attack Vicksburg he soon yielded, and afterward acknowledged that he had been mistaken. Only four of his executive orders make any mention of the disposal of armies. One, dated January 27, 1862, ordered that "the 22 day of February 1862, be the day for a general movement of the land and naval forces of the United States against the insurgent forces,"* mentioned specifically the army about Fortress Monroe, the Army of Potomac, the Army of Western Virginia, the army near Munfordville, Kentucky, the army and flotilla at Cairo, and a naval force in the Gulf of Mexico. The next is dated January 31, 1862, directing the army of the Potomac to seize Manassas Junction.**

*Richardson, Messages and Papers, volume VI, page 100-101.

**Richardson, Messages and Papers, Volume VI, page 101

The third was issued on March 8, 1862, and it reorganizes the army into five new divisions, specifying their commanders.* The fourth bears the same date, March 8, 1862. It orders that "No change of the base of operations of the army of the Potomac shall be made without leaving in and about Washington such a force as in the opinion of the General in Chief...shall leave said city entirely secure." There follow other specific directions for driving the Southern forces from the neighborhood of Washington.** In certain matters of broad military policy it is proper that the President should interfere. A typical case of this kind is the establishment of the blockade of Southern ports. And in certain cases in which the behavior of armies and navies has a significant political bearing, the President's interference may be of the utmost value. Lincoln's administration presents striking examples of such cases. On August 30, 1861, General Fremont issued an order freeing all slaves who reached his lines.*** This alarmed the border States which were ready to fight for the Union but scarcely for emancipation. After privately asking Fremont to change the form of his order without success, the President ordered him to change it "to conform to the terms of the Confiscation Act."**** And he voided a similar order by General Hunter on May 19, 1862.***** On the whole the country approved both actions but to those who opposed them, they brought home the immense power that the President exercises in times of war when the behavior of great armies and great populations is at his disposal as military and civil head of the State. Sumner wrote, "Our President is now dictator, imperator--what you will; but how vain to have

*Richardson, Messages and Papers, volume VI, page 110.

**Richardson, Messages and Papers, volume VI, page 110

***Rhodes, History of the United States, volume III, page 478.

****Rhodes, History of the United States, volume III, page 470.

*****Rhodes, History of the United States, volume III, page 470

the power of a god and not to use it godlike."*

Besides the war powers directly granted by the Constitution, Lincoln exercised certain powers in the Civil War which the Constitution denies the executive, and still others which it forbids to any branch of the government. On May 3, 1861 he issued a proclamation increasing the regular army 22,714 men and authorizing the enlistment of 18,000 seamen for naval service. Now the Constitution vests the power to "raise and equip armies" in the Congress, not in the executive. Rhodes' remarks that "Such action, though clearly beyond the President's constitutional authority, received the approval of the North and later of Congress."**

If to increase the regular army and authorize enlistment of additional seamen is "clearly beyond the President's constitutional authority,"*** it is difficult to see what constitutional defense can be made for the famous call for 70,000 volunteers. In fact, the Southern governors strenuously protested that such action was unconstitutional.**** But the evidence is unmistakable that the North approved, for the volunteers came forward with a rush. And for immediate purposes the approval of the North was more important than the forms of the Constitution.

But the famous and flagrant infringements of the Constitution were the arbitrary arrests.***** Some samples are the following: the arrest of two men at Malone in northern New York; and editor of the New York Daily News at Burlington, New Jersey; two citizens of Maine; a Vermont farmer, who was lied to in order to get him to go to

Bennington, two miles away; a crippled newsboy for selling the New
*Pierce's, Memoir and Letters of Charles Sumner, vol. IV, page 42

**Rhodes, History of the United States, vol. III, page 395

Nicolay and May, Abraham Lincoln, vol. VII, page 2.

***"Since only Congress can raise and equip armies."

****Greeley, American Conflict, page 459.

*****Lincoln, himself came very close to admitting the unconstitu-

ionality of these arrests. For instance in a letter of April 4, 1863, quoted by Nicolay and Hay; Complete Works, volume 11, page 508 and volume VI page 430, "Was it possible to lose the nation and yet preserve the Constitution? By general law, life and limb must be protected, yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Union and therefore the preservation of the Constitution. Right or wrong, I assumed this ground." He first states this same doctrine in the executive order of February 14, 1862. "In this emergency the President felt it his duty to employ with energy the extraordinary powers which the Constitution confides to him in case of insurrection. He called into the field such military and naval forces, unauthorized by the existing laws, as seemed necessary. He directed measures to prevent the use of the post-office for treasonable correspondence. He subjected passengers to and from foreign countries to new passports regulations, and he instituted a blockade, suspended the writ of habeas corpus in various places, and caused persons who were represented to him as being or about to engage in disloyal and treasonable practices to be arrested by special civil as well as military agencies and detained in military custody." But the Constitution does not anywhere confer on the President special powers of any kind in case of insurrection and certainly not these powers. (Richardson, Messages and Papers, Volume VI, page 103.)

York Daily News on the Naugatuck railroad in Connecticut; several citizens of Connecticut for organizing "peace meetings;" Dr. Edson B. Olds in Ohio, a man of 70, who was dragged from his house at night without legal warrant and incarcerated summarily in a fortress for alleged treasonable utterances; James W. Wall, a New Jersey lawyer and author, for severe criticism of the administration.* The most famous case of all was the arrest of the Democratic candidate for Governor in Ohio by order of General Burnside, and his sentence by military court marshal to imprisonment for the length of the war. This man, Vallandigham, was the Western leader of the Democratic party, and so much excitement was occasioned that Lincoln commuted his sentence to banishment and he fled for his liberty to the Confederacy, and thence to Canada.** September 24, 1862 the President issued a proclamation, giving the authority of executive order to Secretary Stanton's orders,*** which created the new offenses of "discouraging enlistments" and "any disloyal practice," and providing that whoever was guilty of these offenses and of anything else affording "aid and comfort to the rebels should be "subject to martial law and liable to trial and punishment by courts martial or military commissions," and for persons arrested on these charges suspended the writ of habeas corpus.**** Thereupon Joel Parker, then Professor and afterward the greatest Dean of Harvard Law School, asked the people of Massachusetts, "Do you not perceive that the President is not only a monarch but that his is an absolute,

*Marshall's American Bastille; Debate in the Senate Dec. 16, 1862.

**Rhodes, History of the United States, vol. IV, pages 247-248.

Burnside's order for the violation of which Vallandigham was arrested, numbered 38, was, "The habit of declaring sympathy for enemy will not be allowed." Rhodes' comment is that "From the beginning to the end of these proceedings, law and justice were set at naught."

***Rhodes, vol. IV, page 169.

****Lincoln, "Complete Works", vol. 11, page 239.

irresponsible, uncontrollable government; a perfect military despotism?"* And the matured judgment of the period's best historian is that "This proclamation... was the assumption of authority exercised by an absolute monarch."** In a lecture delivered in New York and Boston Dec. 1861, Wendell Phillips said: "Lieber says that habeas corpus, free meeting like this, and a free press, are the three elements which distinguish liberty from despotism,..... But today, Mr. Chairman, every one of them.... is annihilated in every square mile of the Republic. We live today, every one of us, under martial law. The Secretary of State puts into his bastille, with a warrant as irresponsible as that of Louis, any man whom he pleases. And you know that neither press nor lips may venture to arraign the government without being silenced. At this moment, 1000 men at least are 'bastiled' ...three times as many as Eldon and George III seized when they trembled for his throne... For the first time in our history government spies frequent our great cities."***

Lord Lyons wrote to Lord Russell September 6, "The United States government assumes the right to arrest persons in any part of the country, and to keep them during its pleasure in confinement in charge of military officers. The courts of law are unable to give any redress as the officers of the army decline to make any return to writs of habeas corpus."**** As to the number of persons thus mistreated, Alexander Johnson states in his article on Habeas Corpus in Lator's Cyclopaedia, that "The records of the provost-marshal's office in Washington show 38,000 military (meaning political) prisoners reported there during the rebellion." Col. F.C. Ainsworth, Chief, Record and Pension Office, War Department***** declares that "a thorough

*Boston Courier, Nov. 1, 1862.

**Rhodes, History of the United States, volume IV, page 169.

***Rhodes, History of the United States, volume IV, page 169.

****British Blue Book, September 6.

*****Rhodes, History of the United States, volume IV, pages 231-232.

search of the records (referred to) have been made...but nothing whatever relative to the subject has been found. I am satisfied that this statement...was really nothing but a guess." However, in the same place Col. Ainsworth says that the records of the Commissary-General of prisoners show 13,535 citizens confined in various military prisons during the war. And he adds, "It is certain that a considerable number of arrests of civilians in addition...were made during the war because it is known that prisoners of this class were confined in State prisons and Penitentiaries, the records of which are not on file. And he adds that probably this list would not include persons arrested by Secretaries of State and Navy.*

It is a very interesting study in human nature, and a somewhat important side-light on the characteristics of democratic government, to observe how these measures were taken by the people. If democracy can with ease be slid over into despotism- an event which has occurred more than once in the course of history, it behooves us to be on our guard. On the other hand, if the people recognize these infringements upon their liberties for what they are, and slough them off with the return of peace, at the same time endeavoring to provide somehow for the emergency of war in a way that will obviate these impositions upon freedom, then we may be reassured. As has been indicated, there were great men, and there were many of them, who fought these arbitrary powers bitterly and openly, whose high position and obvious disinterestedness made their arrest impossible. Senator Trumbull of Illinois introduced a resolution asking for information from the Secretary of State in regard to these arrests. "What are we coming to," he said, "if arrests can be made at the whim or caprice of a cabinet minister."

* Rhodes, History of the United States, vol. IV, pages 231- 232.

** Rhodes, History of the United States, vol. III, page 556.

And the Democratic party did what it could in opposition, but it was very hard, with the censorship that existed, to circulate the opinions of the opposition. The things that might have happened if the papers had pushed such news and the people had been allowed to see the thing clearly for long at a time, is interestingly suggested by the way Democratic majorities suddenly increased in districts just after a particularly flagrant case of this kind had occurred. Vallandigham was defeated, for some northern victories immediately succeeded his arrest, though before they occurred the administration had been exceedingly nervous about what might happen. But two cases are those of Dr. Edson B. Olds, who was elected while in prison to represent his neighbors in the legislature; and of James W. Wall, whose arrest increased the normal Democratic majority in New Jersey, and who was elected by the State legislature to fill an unexpired term in the Senate.* And the Congressional elections of 1862 came near to being what so loyal a Republican journal as the New York Times declared them to be: a "vote of want of confidence in the President".** Nevertheless, there can be no doubt that the country as a whole acquiesced in these abuses of executive power. Rhodes' explanation is: "That the protests against the arbitrary arrests lacked energy and persistence, that the infringements upon the bill of rights of the Constitution were not actively resisted, is explicable only by the confidence the people had in Abraham Lincoln."*** This is satisfactory as an

*Rhodes, History of the United States, volume IV, page 165.

**Lincoln's interpretation of this vote is indicated by Rhodes, vol. III, page 165. "It must be reckoned as one of the results of the election, that he (Lincoln) issued, November 22, an order which.....effectuated the discharge from military custody of practically all the political prisoners."

***Rhodes, History of the United States, volume III, page 165.

explanation, but not reassuring. For it is by no means impossible that a man who deserves confidence less than Abraham Lincoln did, should gain and hold the confidence of the people for four years. Count Gurowski wrote in his diary, January 1862, "The thus called arbitrary acts of the government prove how easily, on the plea of patriotic necessity, a people, nay, the public opinion, submits to arbitrary rule. All this, servility included, explains the facility with which, in former times, concentrated and concrete despotisms have been established. Here every such arbitrary action is submitted to because it is so new, and because the people has the childish naive, but to it honorable, confidence that the power intrusted by the people is used in the interest and for the welfare of the people. But the despots of all times and of all nations said the same. However, in justice to Mr. Lincoln, he is pure and has no despotic longings, but he has around him some atomistic Torquemadas."*

It is important to enquire whether all this iron-handed suppression served any useful purpose. There is always a great temptation to it on the part of administrators in time of war. In the light of history, does it do them any good? It has already been said that it aroused such opposition that Lincoln for the time discontinued it, which suggests that in his judgment it was not at that time doing his administration any good. Although the prisoners were released the policy of making new prisoners in practically the same way was continued, the only difference being that military authorities alone could make the arrests: "Extraordinary arrests will hereafter be made under the direction of military authorities alone."** But even aside from Lincoln's apparent attitude at the time, does it now seem to have

*Rhodes, History of the United States, vol. III, page 556.

**Richardson, Messages and Papers, volume VI, page 157.

cemented the North to the policy of the administration? Lincoln's act in freeing political prisoners in the midst of the continuance of arrests, gives us a chance to compare the country before these individuals were at large, and after. So far as it is possible to see today after the most careful scrutiny, the fact that these people were at liberty hindered the government none at all. Certainly far less than when they were shut up and all their friends were protesting.

The conclusion from my study of unconstitutional action may be put about as follows: in the midst of a desperate war, our democracy, in striving after the efficiency and despatch which characterizes irresponsible power, ceased for the time being to be democracy, and became in the language of Joel Parker and James Ford Rhodes', an absolute monarchy; and that such a course is as dangerous as it is unnecessary.

The Emancipation Proclamation would be entirely illegal from the strict construction point of view. The Constitution, of course gives the President no specific grant of authority for such an act of wholesale manumission, and there was no act of Congress under which it

*Samples of the orders for arbitrary arrests are given in Rhodes', History of the United States, vol. IV, page 235. "Telegram, "War Department, Washington, October 19, 1861. Richard W. Dana Jr. U. S. District Attorney: Send William Pierce to Fort Lafayette. F.W.Seward." Congress authorized executive suspension of habeas corpus by an act of March 3, 1863. (Burgess, The Civil War and the Constitution, vol. II, page 224.) Burgess says (page 217 of The Civil War and the Constitution,) "It may therefore be claimed that it is the precedent of the Constitution in civil war that the President may suspend all safeguards of the Constitution in behalf of personal liberty."

might be done. However, it is an act which on a very liberal interpretation of the constitution, can be defended. As already indicated, Lincoln rested it on the war-powers granted to the President by the Constitution. Its military efficacy is very doubtful. It is impossible to prove that it hastened the end of the war a single day. But its other political effects of course, were very great. Thenceforth and irrevocably, slavery was as much the issue as the Union. To declare that the nation would use its armies and navies to end chattel slavery throughout the resisting South, was to exercise large powers. They were the larger, since there was on the records of Congress at that time a resolution introduced by Congressman Crittendon, passed four days after the Battle of Bull Run, which at that time had given "expression to the common sentiment of the country touching the object of the war," and which declared that the war was "not waged... to... interfere with...established institutions of the Southern States but to...preserve the Union."* At the time when the Emancipation Proclamation was issued, however, Northern sentiment supported it, so far as words went at least. But recruiting, although it showed a slight gain over the previous low rate, did not more than barely respond to the success of Antietam.

Probably the next most famous exercise of war power by President Lincoln was the first American conscription. So far as his own action in this regard is concerned, his right was unimpeachable, amounting to a duty, for he had an act of Congress to go upon. The right of Congress to pass such a law under its constitutional authority to raise and equip armies, can hardly be doubted, and the Supreme Court has upheld it. With certain

* Rhodes, History of the United States, vol. 111, page 464.

exceptions especially set forth, the Act declared that all able-bodied male citizens and persons of foreign birth who had declared their intention to become citizens, between the ages of 20 and 45, should constitute the National forces, and empowered the President to call them forth to draft.* The enrollment for draft was on March 3, 1863. There were some small disturbances but they were quickly put down.* The drawing occurred in the middle of July. And in New York there broke out one of the wildest riots that ever occurred in this country. Negroes were hung in the streets and extensive areas were burned. A report to Washington says: "In brief, the city of New York is tonight at the mercy of the mob."*** One principal reason for popular discontent was a provision which allowed the hiring of substitutes or the payment of 300 dollars for the hiring of substitutes. This highly untactful plan looked to the poor like a plan for making the draft selective of themselves, and added to their natural impatience of compulsion. The riot lasted four days, and then subsided, leaving conscription to go steadily on.**** Thus was placed at the President's absolute disposal the material for as powerful an army as the world has ever seen. No wonder Bryce thought of Cromwell!

The Lincoln Administration was given great and extraordinary powers in finance. The \$900,000,000 loan, passed in January 1863, authorized more bonds, more interest-bearing treasury notes, more non-interest-bearing treasury notes, and fractional paper currency, Or

* Nicolay and Hay, Abraham Lincoln, vol. VII, page 56.

This right of Congress has been upheld by the Supreme Court in the cases testing the recent draft act. Arver vs. United States (U.S. Supreme Court, January 7, 1918) 38 Sup.Ct.159.

Appleton's Annual Encyclopedia, 1863, page 817.

*** Rhodes, vol. XXVII, page 886.

**** Rhodes, vol. IV, pages 321-328.

dinarily, of course, Congress must make appropriations for expenditures. But this act allowed the Secretary of the Treasury to issue before the next Congress, \$900,000,000 of the securities authorized, at his own discretion. This sum would not be overwhelming in modern war-finance, but it left the government of those times fairly well assured that they would be able to supply the sinews of war for a while.*

Aside from this act, the chief financial power exercised by the Administration was in suggesting policies to Congress. Since Congress very closely followed the policy laid down for it, this amounted to a good deal. This was not directly President Lincoln's power, for he knew little about finance and left such matters to his Secretary of the Treasury Chase, who was supposed to know a great deal but who made serious mistakes.**

The President, of course, is given the power to communicate with Congress "on the state of the Union", by the Constitution. But whether that power is great or small depends on the willingness of Congress to follow his suggestions. And under certain circumstances, (rarely in Lincoln's day), the President through unofficial channels can make his will felt in Congress. Lincoln had a majority of his own party to work with. But it was a divided majority, a part of which was offended at first by his refusal to issue any statement committing the North to a war on slavery, and the other part of which was offended after the Emancipation Proclamation was made. And it was a majority that very deeply distrusted a large part of the cabinet--- with more or less reason. After the defeat of Fredricksburg the Senate passed a resolution calling for the resignation of Secretary

*Rhodes, History of the United States, volume IV, page 238.

**Rhodes, History of the United States, volume IV, page 427.

Seward. Rhodes says that Congress would have voted lack of confidence in the President himself.* Lincoln hung on and brought his cabinet through intact, but the distrust was by no means either allayed nor silenced. Of all Lincoln's cabinet, probably Chase commanded the most Congressional respect. But in spite of these difficulties, the party hung together, and voted Lincoln the broadest powers, for it recognized the peril of the emergency and the demand for vigorous executive action. The attitude is typically expressed by Senator Sherman in a letter to his brother the general: "I cannot respect some of the constituted authorities yet I will cordially support and aid them while they are authorized to administer the government.** Only one case is recorded in which it became obvious to Congress that a successful attempt had been made by Lincoln to change its action through means not recognized by the Constitution, and it excited great indignation and plain-spoken condemnation in the Senate. Senator Sherman declared that Congress was held in "duress"; Lane of Indiana declared that "duress" to be the "threat of a veto from the President"; Preston King of New York thought that Congress was coerced, and Senator Wade sneered at the practice of "learning the royal pleasure" before they could pass a bill. Lincoln's extra-legal power over Congress, although great, very distinctly had a limit. That limit seemed to be reached when he allowed Congress to see clearly that he was using the prestige and political leverage of his office to get his measures adopted, even when Congress originally intended otherwise.***

*Rhodes, vol. IV, page 170. Later in that session Thaddeus Stevens thought of moving a vote of want of confidence in the administration. (Rhodes, vol. IV, page 240.)

**And Joseph Medill wrote to A.S. Hill, March 20, 1863, "Let us first get the ship out of the breakers; then court-martial the officers if they deserve it." (Rhodes, vol. IV, page 241.)

***Congressional Globe, Debate of July 16, 1862, pages 33-75 et. seq.

An executive order of February 11, 1862 reads as follows:

"Ordered, that D.C. McCallum be, and he is hereby appointed military director and superintendent of railroads in the United States, with authority to enter upon, take possession of, hold and use all (railroad property) that may be required for (the military purposes) of the United States, and do and perform all acts and things that may be necessary or proper for the safe and speedy transport aforesaid."*

It is confined to the military uses of the railroads. This was by the authority of the Act of Congress approved January 31, 1862, entitled "an act to authorize the President of the United States in certain cases to take possession of railroad and telegraph lines, and for other purposes.**"

An executive order dated February 25, 1862, reads: "Ordered, that on and after February 26, instant, the President, by virtue of the Act of Congress, takes military possession of all the telegraph lines in the United States." The order proceeds, 2nd., to forbid unauthorized military communications, 3d., to proclaim that newspapers publishing unauthorized military news would thereafter be excluded from telegraphic service, 4th., to constitute Edward S. Sanford military "supervisor" of telegraph messages through the United States, and Anson Stager military superintendent of telegraph lines and offices in the United States.

Besides these powers over domestic communications, Lincoln was given and assumed certain others over external commerce, including commerce with the rebellious States. By the Act of July 13, 1861,

* Richardson, Volume VI, page 10.

** Richardson, Volume VI, page 116.

commercial intercourse with States that were by the President's proclamation declared in rebellion, was prohibited so long as hostility continued, except as permitted by the President under rules prescribed by the Secretary of the Treasury. Lincoln understood himself to be constituted the judge of the time when hostilities ceased to continue, in the sense of this act, which was not unreasonable, and March 31, 1865, he issued a proclamation re-opening commerce with certain conquered Southern States.*

But it required in his mind only the war-clauses of the Constitution to authorize him on November 21, 1862, to issue an executive order prohibiting the export of arms, ammunition or munitions of war. Munitions of war included everything which in the judgment of officials was useful for the conduct of the war.** This same order directed the Secretary of War to retain certain shipments of munitions bound for Canada which he had already seized on his own authority. There can be no doubt that this was an entirely necessary war-measure. It comes much nearer than some of his other acts to being covered by the passages of the Constitution which made him custodian of the executive power and commander-in-chief of the army and navy.

The Confiscation Act of July 12, 1862 was an act giving what Congress regarded as special powers to the President. It authorized the President to use the negroes as soldiers, gave him power to amnesty rebels by proclamation and make exceptions from a general pardon.*** Almost certainly there is not one of these powers that

*Richardson, Volume VI, page 174.

**Richardson, Volume VI, page 178. Executive order of September 4, 1863, and volume VI, page 235, executive order of April 2, 1864.

***Rhodes, History of the United States, Vol. IV, page 60 and 62.

the President would not have taken in case of need whether such an act of Congress existed or not. It suggests that Congress may perhaps not have clearly understood the nature of authority under which it was living. The Emancipation Proclamation did not simply confiscate slaves of rebels who were subdued, but declared a policy of emancipation. The colonization of freed negroes was not strictly a war-power, but if it had ever become necessary to the advancement of the war it can hardly be doubted that Lincoln would have done it in a moment by executive proclamation. The use of negroes as soldiers really did not need Congressional authorization. As for the power of pardon, the Constitution specifically confers on the President the "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."*

The war-powers of President Lincoln have now been described. General comment upon them will be reserved until the powers of President Wilson have been described, for purposes of comparison.

* Article 11, section 2.

CHAPTER THREE

WAR POWERS OF PRESIDENT WILSON

On April the second, nineteen hundred seventeen, President Woodrow Wilson asked Congress to "take immediate steps not only to put the country in a more thorough state of defense but also to exert all its powers."* On April the nineteenth, after more than two weeks, the House Military Affairs Committee reported a bill.** in less than half the time taken to report this measure, Prussia in her war against Austria had defeated her enemy at Libenau, Turner, and Podell. In two days less than that Sadowa was fought, overthrowing Austria. Forty-five days after President Wilson's message was read, on the seventeenth of May, Congress finished the army bill.***In the Franco-Prussian war only that number of days had elapsed when the battle of Sedan was fought.

On the basis of these facts it may be safely said that the United States, which has now become a member of the council of nations, gave its executive a very insufficient war power in April, 1917. If it is urged that we can depend on the oceans to protect us from sudden attacks like those which are delivered

*Pres. Wilson's War Message, N.Y. Times Current History Magazine, May, 1917.

**Chicago Tribune, April 20.

***Chicago Tribune, May 18.

by modern European powers, it is enough to suggest the memory of the U.S.S. the German submarine that appeared off our Atlantic coast one fine day. And added to this fact of the long arm of modern military powers is the attitude of Canada on the subject. Canada also has the protection of the oceans, and there is on her statute books today a law which requires the executive to do and authorize such acts and things as may be deemed "necessary or advisable for the peace, order, security and welfare of Canada" - which means that the Canadian legislature gives the Canadian executive in one lump all the emergency authority that it can possibly give him under the Canadian constitution act.*

For years the United States Congress has been exercising great executive powers. And it seems clear that this is not to the advantage of the nation, for a Congress of two houses and four hundred individuals is not the proper body to exercise executive authority. Obviously it is very hard to hold it responsible for executive acts and the success of its executive policies. And what makes the situation still worse, when Congress is exercising executive authority it is hard for the country to hold the President responsible for executive acts - the two branches can shift responsibility back and forth.

One of the worst phases of this confusion of function and consequent waste is the habit that Congress acquired of including "instructions" to executive officers as riders in appropriation bills. In 1933 Senator Aldrich as chairman of the Finance Committee computed the waste of public money that results from this

* H. J. Ford, "War and the Constitution", in the Atlantic Monthly, Vol. 120, pp. 25-33.

practice as \$50,000,000 per annum.*

Great executive powers are exercised by Congressional Committees. For example, the committee in charge of Navy Yards determines where docks and naval bases shall be located, and how they shall be equipped. The result is suggested by the debate in the House of February 15, 1902, in which this committee, charged with failing to provide docks large enough for modern battle-ships of the line, replied that the fault lay with Congress which should never have ordered such monsters! The power that Congress exercises in federal appointments, a purely executive function, is notorious. Such usurpation of executive authority by a dilatory, politics-affiliated, deliberative assembly, has led in certain historic cases, to Caesarism. Perhaps the most surprising example of the way in which Congress has tended to become both legislature and executive, is the case of "concurrent resolutions". The Constitution provides that "every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except as to questions of adjournment) shall be presented to the President of the United States" for his approval.** Yet, strange to say, concurrent resolutions are not today submitted to the President for veto. Professor H. J. Ford says that "By this device Congress makes a large distribution of gratuities, perquisites, and offices among members at every session."***

It is obvious that a re-statement of the powers of the

* Ibid.

** Article 1, Section 2.

*** H. J. Ford, Ibid.

executive had become necessary by April, 1917.

There is nothing like a war to magnify the executive. The greater the emergency, the greater the powers he receives. This is particularly likely to be true if the executive is a man of force, commanding the respect and confidence of Congress and the country. Add to this a rare understanding of American history and government, and a 30 year advocacy of a change in the relationships of executive and legislature,* and one begins to understand how to account for Woodrow Wilson.

In three respects in particular, the war powers of President Wilson are unique. First and foremost, in his control over industry and commerce. Second, in his control over Congress (and to a lesser degree the public opinion of the country). Third, in his freedom from Congressionally provided executive machinery. These three will be described last, in this order. Wilson's other powers are not precisely like anything that has been done by a President before, but they have greater similarities to the war powers of other times, or are less important.

The first thing that brought home to the country the fact that we were at war and extraordinary executive functions were being exercised, was the selective draft. The act was approved May 18, 1918, and empowered the executive to conscript for military service all able-bodied citizens and persons of foreign birth who had taken out their first naturalization papers, who were between the ages of twenty-one and thirty, inclusive.**

* An Old Master, and Other Essays, by Woodrow Wilson, p. 45.

** Times Current History Magazine, July 17, Vol. VI,
pt. II, No. 1, p. 14.

The registration-day was June 5, 1917. From various parts of the country plots to oppose the draft were reported. "The Department of Justice had a tremendous machinery ready to cope with these conspiracies, but it was unnecessary." The severest penalty for resistance was three years imprisonment passed on an anarchist named Louis Kramer.* This is the only disturbance recorded and is a striking contrast to the sporadic outbursts on the day of Civil War draft registration, and the four-day riot in New York on the day of the lottery. Many who declined to register have been sentenced to a year's imprisonment under the act - no one knows just how many.

About nine and three quarters million registered under this act. In May of 1918 Congress voted that all young men who had become twenty-one since June fifth 1917 should register for draft on a date set by the President. General Crowder estimated that a million men would register under this act. The President set June 5, 1918, as the date for the new registration by proclamation.**

As commander of the army and navy President Wilson can exercise even less direct control than did Lincoln. In the first place the fighting is three thousand miles away across the Atlantic. In the second place, the allies have agreed on one central supreme commander for the Western front. And in the third place, fighting is infinitely more technical a matter than it was even in Civil War days. Doubtless Wilson had a great deal to do with large decisions like sending Pershing over with an advance

* Statement by Committee on Public Information and Times Current History Magazine, July 17, page 14, evening of June fifth.
** Chicago Tribune, May 20, 1918

force, but just what this share may have been in the strictly military councils of the nation it is impossible now to determine, aside from the certainty that he has decided the appointments of men for the higher military and naval positions. That power he could scarcely delegate.

A proclamation of November 19, 1917, provides under section 4067 of the revised statutes that by means of military guards enemy aliens shall be prevented from approaching within prescribed water-fronts, or within three miles of navigable streams. They are expelled from the District of Columbia and the Panama Canal Zone. They must be registered, must obtain government consent if they wish to change their occupations, and must report from time to time to federal authorities and municipal officers.*

The only thing in President Wilson's policy bearing any resemblance to the arbitrary arrests of Lincoln's time is the treatment of enemy aliens laid down in this order for Germans and in a later order for Austrians. The treatment is identical for the citizens of the two countries. Section 12 of the order provides that "An alien enemy whom there may be reasonable cause to believe to be aiding or about to aid the enemy, or who may be at large to the danger of the public peace or safety, or who violates or attempts to violate, or of whom there is reasonable ground to believe that he is about to violate, any regulation duly promulgated by the President, or any criminal law of the United States, or of the States or Territories thereof, will be subject

* Times Cur. Hist. Mag. Jan. 1918, vol. VII, pt. ii, No. 1, page 61.

to summary arrest by the United States Marshal, or his deputy, or such other officer as the President shall designate, and to confinement in such penitentiary, prison, jail, military camp, or other place of detention as may be directed by the President."* The Constitution of the United States provides, "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury ... nor shall be ... deprived of life, liberty, or property, without due process of law."** I suppose that even enemy aliens are "persons". The status of International law on the subject is set forth by Coleman Phillipson, in his "International Law and the Great War":** "Though there is no definitive international law on the subject, it has become a modern customary rule that enemy aliens ^{may not be} arrested." However, it is necessary to remember that many enemy aliens are reservists in the armies of our enemies. The protections of the Constitution do not extend to prisoners taken on the battle-field, and these enemy aliens in this country, when reservists in the armies of our foes, are in an analagous position. And whether or not this order was in accordance with the Constitution, it was certainly in accordance with the powers conferred on the President by act of Congress. It is provided that "Whenever there is declared a war between the United States and any foreign nation or government, ... and the President makes public proclamation of the event, all natives, citizens, denizens or subjects of the hostile nation or government being males of the age of fourteen

* Am. Jour. Int. Law, Jan. 1918, vol. 12, No. 1, p. 161.

** Extract from Article V of the Amendments.

*** Pages 23-25.

years or upwards who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies."*

The next clear division of President Wilson's powers is his authority over commerce and industry.

These functions had a beginning before the United States entered the war, but were in anticipation of our entry into the struggle. I omit mention of the United States War Risk Insurance Bureau, which is not the soldiers and sailors insurance agency mentioned later, but a government-owned marine insurance company, established in 1915 because the private companies were reaping such harvests from the timidity of ship-owners during our neutrality. It cut private rates in half and made a profit of \$4,455,824 in three years.** The first step was the appointment by the President on his own authority of the Committee on Industrial Preparedness, which made a canvass of the industrial resources of the country under Howard E. Coffin and secured valuable confidential data concerning 29,000 establishments.*** Then - still before the country went to war - this committee was replaced by the Council of National Defense, composed of the Secretaries of War, Navy, Interior, Commerce and Agriculture, and an advisory commission of seven non-official citizens, presided over by Mr. Coffin and including great industrial magnates, chief among whom

*Revised Statutes, sect. 4087.

**Times C.H.M., July, 1917, vol. VI, pt. ii, No. 1, p. 25.

***For this and following see Times C.H.M. for November, 1917, vol. VII, pt. i, No. 2, pp. 333 et seq.

was Daniel Willard, the railroad president. Under this body there sprang up a complicated network of boards and commissions which multiplied rapidly as soon as we declared war, as I know, for I was in Washington in the Munsey Building which housed the Council, from the middle of April, 1917, to the middle of the following August. At first its most important subsidiary was the General Munitions Board under Frank A. Scott, chairman. Then at the end of July this was replaced by the War Industries Board, still under Mr. Scott, intended to act as the chief permanent committee of the Council of National Defense, having under it seven committees, each over some great division of industry. This Board had the power to fix prices - not through Congressional Act, but simply because the President was able to induce the businessmen of the country to accept his rulings. This was a striking example of the extra-legal power acquired by the chief executive in time of war. He issued on July 11, 1917, a proclamation that ought to become historic. It began, "The Government is about to attempt to determine the prices at which it will ask you henceforth to furnish various supplies."* It is not followed by a threat, but by an appeal to the fairness of the business of the country. One was quite justified in wondering what the profiteering plutocrats would do about it. The first great order under the proclamation was issued by the War Industries Board on the authority of the President on September 21, 1917,** by which the prices of the different forms of steel and iron were cut one-half or more, on the theory, publicly announced, that this still left the iron-

*Times C.H.N., August 1917, vol. VI, pt. 11, No. 3, p. 237.
**See Daily Papers of September 23.

masters a fair profit. And the order was unhesitatingly accepted, so far as the public could see. According to an official statement the saving in various grades of iron and steel amounted to from 40 to 70 percent.*

Under the War Industries Board was shortly organized the Priority Board, headed by E. S. Lovett, which placed the distribution of iron and steel absolutely under control by license.

Perhaps it is not entirely impossible to explain the docility of big business under President Wilson's direction in this and many other matters. The great magnates must have realized that the President had them pretty much in his power, due to the fact that if they had displayed any but the most thoroughly coöperative spirit the country would have been so disgusted that it would have enthusiastically supported a proposition from the President that the government take over these businesses and operate them for the duration of the war. And if the government once proved that it could handle such an enterprise for the benefit of the people, these profiteers would have had their hands full getting their businesses back again. There is great reason to believe that this is the way the business men sized up the situation, for this is exactly what happened to several great businesses, notably the railroad business and the grain broker business. President Wilson has not waved a big stick over the trusts very much, but there is nothing more certain than that there was one in his easy reach. And he has struck once or twice with amazing effect.

* Times C.E.M., November 1917, vol. VII, pt. i, No. 2, p. 334.

The railroads started out on the same plan of voluntary cooperation. A group of railway chiefs under Daniel Willard was associated with the Council of National Defense, and it accomplished huge results. For example, the pooling of lake coal and lake ore saved 52,000 cars per annum. And by a similar pooling of tidewater coal a saving of 133,000 cars was effected.* But even results like these were not enough. The railway officials were ready to go to a certain point but when the plan for efficiency in the whole system necessitated too deep a cut into the profits of some company, the line was drawn. In the case of the roads President Wilson already had authority to act under the law of August 29, 1916, which provided that he could take possession of the railroads, for military uses "and such other purposes connected with the emergency as may be needful or desirable." An executive proclamation was issued December 26, 1917, under which the Federal Government took full control. The roads should have known better than to stick at profits. The Secretary of the Treasury, William Gibbs McAdoo, the President's son-in-law, was appointed Director of the Railroads, and he issued his first order December 29, pooling all terminals, ports, locomotives, rolling stock and other transportation facilities, thereby making the railroads a single great system. In a few days the market value of railway stocks alone went up \$350,000,000.**

*Times C.N.M., February 1918, vol. VII, pt. II, No. 2, p. 252.

**The facts of government control over the railways are conveniently given in a summary of Associated Press dispatches in the Times C.N.M., February 1918, vol. VII, pt. II, No. 2, pp. 249 et seq.

The President wanted a more specific Congressional grant of powers for this huge undertaking. The railroads of the country are composed of 441 distinct corporations, their securities are held by 330,000 individuals, they include 330,000 miles of lines, represent an investment of seventeen and a half billion dollars, and employ an army numbering 1,600,000.* In February, accordingly, Congress passed the Railway Control Bill, giving the executive a free hand in the administration of the roads, providing they should not remain in government hands under this act more than 21 months after the end of the war, and guaranteeing the owners about \$945,000,000 per annum.**

Drastic orders have been issued as to the way in which the roads should be run, and millions of dollars have been saved thereby. For a long time the personnel of the railroads was undisturbed. But on May 21, 1918, Director McAdoo issued an order removing the presidents of all the railroads, preparatory to placing Federal agents in their positions. To what extent these Federal agents will be the old railway presidents has not yet developed.***

On April 28, 1917, President Wilson issued an order concerning the telegraph, telephone and cable communications of the United States reading in part as follows: "Therefore, by virtue of the power vested in me under the Constitution and by the Joint Resolution passed by Congress on April 6, 1917, declaring the existence of a state of war, it is ordered that all companies

*Ibid.

**Ibid.

***Chicago Tribune, May 22.

or other persons, owning, controlling, or operating telegraph and telephone lines or submarine cables, are hereby prohibited from transmitting messages from points within the United States, and from delivering messages received at such points, except those permitted under rules and regulations to be established by the Secretary of War for telegraph and telephone lines, and by the Secretary of the Navy for submarine cables." A similar order taking possession of radio stations was issued so as to be practically effective on April 6, the day of the declaration of war, but it was amended to be more stringent and to specify the additional authority of the Act to Regulate Radio Communication, approved August 3, 1918, on the last day of April.*

The Lever Food and Fuel Control Bill passed Congress August 10, 1917, after a bitter debate. The President's statement of May 18, 1917, asking for this legislation reads, in part, as follows: "The objects sought to be served by the legislation asked for are: Full enquiry into the existing available stocks of food-stuffs and into the costs and practices of the various food-producing and distributing trades; the prevention of all unwarranted hoarding of every kind, and of the control of food-stuffs by persons who are not in any legitimate sense producers, dealers, or traders; the requisitioning when necessary for the public use of food-supplies and of the equipment necessary for handling them properly; the licensing of wholesome and legitimate mixtures and milling percentages; and the prevention of the unnecessary or wasteful use of foods.

*For these orders see the Supplement of the American Journal of International Law, January 1-16, vol. 13, No. 1, pp. 12 & 26.

"Authority is asked also to establish prices."*

The legislation asked for was forthcoming. Immediately on his appointment as Food Administrator, Mr. Herbert E. Hoover issued a statement of purposes, part of which follows: "The hopes of the food administration are three-fold. First, to so guide the trade in the fundamental food commodities as to eliminate vicious speculation, extortion, and wasteful practices, and to stabilize prices in the essential industries. Second, to guard our exports. ... ** And third, that we stimulate in every manner within our power the saving of our food.***

The signing of the Food Control Act had a salutary effect, before Mr. Hoover had raised a finger. Cash corn fell off 25 and 37 cents a bushel in Chicago, and 30 to 32 cents in St. Louis. The last Chicago quotation for one day showed a loss of 50 cents in three days. In three days wheat declined 4 cents a bushel. Potatoes sold \$2.00 down from the former high price. Poultry dropped 2 to 3 cents a pound, eggs 2 cents and butter one cent.**** The very fact that the government had these powers evidently made it unnecessary to use them to the limit. The price of wheat was fixed by executive proclamation, Mr. Hoover at his own request not taking any share in that decision. And it was announced that Mr. Hoover, "as a preliminary step" intended to take over control

*Times C.R.N., Sept., 1917, vol. VI, pt. II, No. 1, p. 389, et seq.

**A power which, although placed partly in the food administration by the President, was not vested by the Lever Bill, but by the Embargo Act, described later.

***Ibid.

****Ibid., November 1917, vol. VII, pt. I, No. 2, p. 236.

of all grain elevators and all mills with a daily capacity of over 100 bbls. of flour and place them under a system of licenses that would make hoarding impossible. At the same time the Grain Exchanges were requested - how grimly they must have smiled at that word "requested"! - to suspend all dealings in futures. They saw fit to comply. A \$50,000,000 corporation was formed under the Food Administration, known as the United States Grain Corporation, which went into the grain brokerage business at the terminals and proceeded to buy up the whole 1917 wheat crop! It made not a dollar of profit; it served as the "middle-man", so that every bushel of wheat in the country passed through the hands of the government from the elevators and terminals to the mills. The millers were allowed a profit of 25 cents a barrel.*

A provision in the food bill prohibiting the manufacture or import of distilled liquors became effective September 8, 1917. The estimated saving of food grain was 40,000,000 bushels a year. The power to suppress this trade and manufacture was granted as a war measure.

A proclamation of September 15, 1917, placed the sugar industry entirely under government control through a system of licenses, and in October the price of beet sugar at refining centers was fixed at \$7.25 per cwt.**

The bulk of the food business of the country was brought under the absolute control of Mr. Hoover on October 10, 1917, by an executive proclamation issued under the food-control act, which

*Ibid.

**Ibid.

subjected all dealers in essential foodstuffs to a strict licensing system, to go into effect November 1, 1917. Thereafter the government dictated the manufacture, storage, importation, and distribution of food, under the penalties of the Food Control Act.*

Two other proclamations clinched the power of Hoover, one issued November 3, 1917, prohibiting all direct trade in flour between America and Europe, and another, November 12, 1917, extending the licensing system to the bakeries which, like the railroads, had not been wise enough to carry out voluntary cooperation when it meant contenting themselves with only a reasonable profit.**

The United States Grain Corporation does not represent the whole of the food-trading activities of the Food Administration. It immediately engaged in the trade in other commodities and when it observed any attempt to manipulate exchange for the purpose of inflating prices, it immediately entered the lists as the champion of the ultimate consumer. For example, to smash one great sugar conspiracy, Hoover arranged to take over 200,000,000 lbs. of raw Louisiana sugar, the whole transaction involving about \$13,000,000.

Besides such activities as these the Food Administration engaged in a country-wide campaign of publicity, and before November, one family out of three in the United States was pledged to observe the rules of the administration.

It was very easy to see the results of these measures. The country would have been satisfied if food prices had not continued

*New York Times, October 11.

**This, and the activities of the Food and Fuel Administrations described below are summarized in the New York Times C.H.M. for January, 1918, vol. VII, pt. II, No. 1, p. 423 et seq.

to soar out of sight, and ultimately that may be all that the most efficient administration can accomplish. For the food emergency is acute and world-wide. The Allied crop was 500,000,000 bushels short of normal in 1917. Mr. Hoover said: "Whereas we exported before the war but 80,000,000 bushels of wheat per annum, this year, by one means or another, we must find for them 225,000,000 bushels and this in the face of a short crop."* This was only the wheat problem. But in spite of these immense difficulties, the previous hysterical rise in food prices was not only checked, but in December 1917 the prices of food actually showed a decline. The Food Administration was a success.

In the same Act which established Food Control, a Fuel Administration was authorized with similar sweeping powers. Here the experiment of voluntary coöperation under Dr. Garfield, formerly President of Williams College, seems to have been continued too long. A period of extremely severe weather, precipitated a crisis and again the hand of iron came plainly into view. Beginning January 13, Garfield ordered that every factory east of the Mississippi River, except food-producing establishments, should shut down for five days, and on nine successive Mondays immediately following. The order was backed by President Wilson's published approval, but it naturally raised a storm. Storming did not the least good, however, and in fact the great majority of people seemed to realize the necessity for following the lead of the Administration even in extreme measures like these. So the protest subsided, particularly as the shortage was rapidly

*Ibid.

relieved. There was enough coal in the country, but the fuel problem is partly a problem of distribution, and it was here that the trouble seemed to be. The success of the measure made it unnecessary to continue the plan for nine heatless Mondays after two had passed.*

The next great and striking extension of executive authority over business for war purposes, is the government control of shipping. It is not only a power of control, but of construction, purchase, and confiscation.

It became evident before we entered the war that the success of the allies was more imperilled by the submarine menace to ocean communication than by any other single physical factor. The problem of making the most of available shipping and increasing the supply, was one of first importance when we declared war. We could make armies and supplies faster than the ships then in the water could carry them over - very much faster. And all the time the submarines kept pegging away. On April 16, 1917, President Wilson secured legislation establishing a Shipping Board; with power to administer all shipping, and generally oversee and direct the merchant marine situation. The law authorized under the Board, a Building Corporation, subsequently organized as the Emergency Fleet Corporation, with a capital of \$50,000,000 - all, of course, under the ultimate control of the President. Important features of the program were delayed almost exactly six months by a squabble between the Board and the Corporation over the kind of ships that ought to be built, wooden or steel. It

*Ibid.

was ended by the head of the Fleet Corporation resigning and by President Wilson's calling for the resignation of the head of the Board. On October 15, 1917, the Board issued an order taking over all steamers of over 2,500 tons that were at that moment subject to the jurisdiction of the United States. This did not include many ships of American registry, for the United States at that time had practically no merchant marine. But it got between 700 and 800 vessels that were in our ports and building on our ways, most of which belonged to Great Britain, Norway and Holland - a tonnage of about two million.*

Already the United States had taken over many of the German and Austrian ships in our ports** - the latter being requisitioned and paid for, since we were not at that time at war with Austria.*** In early June the Navy took fourteen more German ships; it took 16 more on July 27, and we had got the Austrian vessels, 14 of them in June. On October 17, the President, by executive order, took 87 additional German vessels, all that remained in the ports of the United States. On April the sixth the United States had practically no merchant tonnage. By October the seventeenth she had commandeered from her own citizens, from her allies, her enemies and neutrals, a government owned merchant fleet of almost 3,000,000 tons!

* New York Times, October 13.

** On April 6, 1917, the Navy took about 100 German ships in our ports, amounting to approximately 600,000 tons and worth \$100,000,000.

*** A joint resolution, approved May 17, 1917, authorized the President to take over the vessels of nations with which the United States was at war that were in our ports. See New York Times, May 13, 1917.

This was surely a good beginning. On November 13, 1917, the Shipping Board announced an agreement by which the United States took over 400,000 tons of shipping owned by northern European neutrals and Japan.* And on August 24, 1917, the Shipping Board submitted estimates calling for the construction of 1,370 ships, of 7,883,000 tons burden, bringing the appropriation for building, commandeering and purchase, up to \$2,000,000,000. The money was voted and contracts for three great government owned ship-building yards were let August 31 by the Emergency Fleet Corporation. The scale on which these enterprises were undertaken is obviously very great. For illustration, after the first ship is turned out from one of these yards it can produce a 5000-ton steel vessel every two working days. A single contract to private builders called for fifty ships of 7500 tons each, capable of developing 11 knots speed, and worth \$1,100,000 apiece; also, 70 ships of 8000 tons burden each, capable of 16 knots, (passenger steamers on the Lakes are sometimes satisfied with 12 and 13) and each worth \$1,600,000.

On September 6 the Shipping Board announced the establishment of the American Chartering Commission, to have absolute power over all charters of American ships or by American shippers. By this means it can say what things shall be shipped, in what vessels, and where they shall go.**

Such are the powers exercised by President Wilson over the shipping situation, both directly through his own executive order and proclamation, and indirectly through boards and corporations

* The Official Bulletin, Nov. 13, 1917.

** Ibid., Sept. 6.

which he can establish, modify, abolish, and direct.

The next great commercial power put into the hands of the executive, is the entire control of foreign commerce. The Trading with the Enemy Act, approved October 6, 1917, reads in section 11: "Whenever during the present war the President shall find that the public safety so requires and shall make proclamation thereof it shall be unlawful to import into the United States from any country named in such proclamation any article or articles mentioned in such proclamation except at such time or times, and under such regulations or orders and subject to such limitations or exceptions as the President shall prescribe, until otherwise ordered by the President or by Congress." Section 5, paragraph (b) of the same act provides that "the President may investigate, regulate, or prohibit under such rules and regulations as he may prescribe, any transactions in foreign exchange, export or earmarkings of gold or silver coin or bullion or currency, transfers of credit in any form, (other than credits relating solely to transactions to be executed wholly within the United States), and transfers of the evidences of indebtedness or of the ownership of property between the United States and any foreign country." And section 8, paragraph (e) gives him the power to suspend any part of the act by proclamation: "No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act."*

*Public. No. 91, 65th Congress, in Am. Journal of International Law, Supplement, January 1918, vol. XII, No. 1, pp. 37 et seq.

In accordance with the great powers vested by this Statute, President Wilson on October 12, 1917, issued an executive order which is probably one of the longest that was ever issued from the White House. The first two sections read:

"I hereby establish a War Trade Board to be composed of representatives, respectively, of the Secretary of State, of the Secretary of the Treasury, of the Secretary of Agriculture, of the Secretary of Commerce, of the Food Administrator, and of the United States Shipping Board.

"I hereby vest in said Board the power and authority to issue licenses ... or to withhold or refuse licenses, for the exportation of all articles, except coin, bullion, or currency."

In subsequent paragraphs this Board is given power to make exceptions to orders of the President declaring embargoes on certain articles, to issue licenses to trade with the enemy, to make the rules and regulations for its own proceedings. A War Trade Council, composed of the same individuals whose representatives make up the War Trade Board, is established to act in an advisory capacity to the latter body. The Secretary of the Treasury is given the administration of the executive powers mentioned in the act and quoted above in regulating the movement of coin and bullion and other foreign exchange.* Nothing can leave the United States without the executive's permission.**

Financial control is very closely related to, and indeed is in these days almost necessary to, complete industrial and

*An Alien Property Custodian is provided for.

**Am. Journal of International Law, Supplement, January, 1918, vol. XII, No. 1, pp. 51 et seq.

commercial control. The great businesses which the government is carrying round themselves hampered by a stringency in the money market. The first War Congress voted to spend over eighteen billion dollars, and the government immediately began to float immense loans. This pretty well used up the available credit of the country. Private business was embarrassed. The War Finance Commission was created by Act of Congress on April 5, 1918, to grease the wheels of the financial machine where they ground too hard. Its structure was as follows. Five directors, including the Secretary of the Treasury, were to be appointed by the President. There was to be a so-called Capital Issues Committee of seven members, three of them from the Federal Reserve Board - all chosen by the President with the consent of the Senate. The President can remove any member, without the consent of the Senate, and he appoints the first chairman. The corporation is to have a life of ten years, but can perform no function save liquidation six months after the war. It is to have a capital stock of \$500,000,000, held by the United States Government and it can issue three billion dollars worth of bonds. Now as to its powers. It can make advances of not more than 15 years duration to any bank or trust company which has loaned money to an established business, up to 75 percent of the original loan, provided, that the Capital Issues Committee regards that business as essential to the conduct of the war.* The loan is secured to the War

*Railroad securities were exempted by Congress from the review of the Capital Issues Committee, on the theory, evidently, that all loans to railroad companies promoted the war. This may be questioned. It would be an interesting study to follow the trail of the railroads over the pages of the Congressional Record during the past ten years.

Finance Corporation by the original collateral taken by the banker and by the banker's endorsement. In the next place, the Corporation can make loans to savings banks, commercial banks and building and loan associations, provided, that the loan does not run over one year and is secured by 133 percent collateral, and provided further, that the transaction is approved by the Capital Issues Committee as promoting the industrial processes essential to the war. In the third place, the Corporation can make direct loans for a period of not over five years to any private borrower who has not been able to obtain funds on reasonable terms through the ordinary channels. In this case the approval of the Capital Issues Committee is again required, to insure the necessity of the transaction to the prosecution of the war, and 125 percent collateral is demanded. Finally, this commission is authorized to deal in any class of United States Bonds issued subsequently to September 29, 1917. The object of this provision is to allow it to guide trade in these securities with a view to stabilizing their value. The purpose of this legislation is to keep the financial machinery of the country running smoothly and steadily. The power of the administration over foreign exchange contributes to its control over domestic finance.*

The war powers exercised by President Wilson over the industry, commerce, and finance of the nation have now been described. The next grand division of his war powers is the authority which he exercises over the opinion of the country, primarily

*The best current summary of this legislation that I have been able to find is in the Review of Reviews, May 1918, vol. LVII, no. 15, pp. 467 et seq.

in Congress, but also in the press and even in the daily conversation of the people.

First, as to President Wilson's control over Congress. "He appears at the Capitol and addresses Congress in his own person. He visits the President's room in the Senate wing and meets law-makers on public business. He formulates administration policies, involving legislation, and gives them something of the effect of Government Bills in Parliament."* These are powers the assumption of which the necessary leadership by the executive in time of war has made easy.

One of the first things that President Wilson did after the declaration of war, was to issue an executive order on April 14, 1917, reading as follows: "I hereby create a committee on Public Information, to be composed of the Secretary of State, the Secretary of War, and the Secretary of the Navy, and a civilian who shall be charged with the executive direction of the committee."** This committee has issued such official news as it thinks the people ought to have, and takes pains to present the facts and essential considerations upon which the administration reaches important decisions. The newspapers took frequent occasions to attack the Bureau at first, but later this opposition waned. The Review of Reviews said in the May issue for 1918,*** "When the Bureau was established there was fear lest it might assume an attitude restrictive of the proper freedom of the press.

*Review of Reviews, May, 1918, vol. LVII, No. 5, p. 460.

**Any copy of the "Official Bulletin" issued daily by the committee.

***Review of Reviews, vol. LVII, no. 5, p. 465.

It has proved, on the contrary, to be a supporter of the rights of the press, and it has done much to promote a policy of publicity as against one of undue official secretiveness."

There are three acts of Congress which give the administration extraordinary powers over the press, the mails, and conversation. The first is the Espionage Act, approved June 15, 1917, which provides that "when the United States is at war, whoever shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of its military or naval forces, or to promote the success of its enemies, and whoever, at such a time, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in such forces, or shall willfully obstruct the recruiting or enlistment service, to the injury thereof or of the United States, shall be subjected to punishment."* Criticism of the administration of a kind to hamper it in the conduct of the war is made very difficult by this act. The second legal provision covering such matters is in the Trading with the Enemy Act.** The act reads,** "Whenever during the present war, the President shall deem that the public safety demands it, he may cause to be censored under such rules and regulations as he may from time to time establish, communications by mail, cable, radio or other means of transmission passing between the United States and any foreign country that he may from time to time specify, or which

*American Journal of International Law, vol. VII, No. 1, p. 83.

**Subsection (d) of section 3.

***Am. Journal of International Law, Supplement, vol. XII, No. 1, January, 1918, page 29.

may be carried by any vessel or other means of transportation touching at any port, place, or territory of the United States and bound to or from any foreign country." Under this act the executive order of October 12, 1917, established in sections fourteen and fifteen a censorship board, as follows:* "I hereby establish a Censorship Board to be composed of representatives, respectively, of the Secretary of War, the Secretary of the Navy, the Postmaster General, the War Trade Board, and the Chairman of the Committee on Public Information. And I hereby vest in said Censorship Board the executive administration of the rules, regulations and proclamations from time to time establish by the President, ... for the censorship of communications." A statement issued by the Postmaster General is as follows: "We shall take great care not to let criticism which is personally or politically offensive to the Administration affect our action." But "a person may not say that the Government is controlled by Wall Street or munition manufacturers or any other special interest. ... We will not permit the publication or circulation of anything hampering the war's prosecution or attacking improperly our allies."**

The third and last of these measures has just been passed, and is called the second Espionage Act. The act was passed May 7, 1918. It provides that the Postmaster-General, if in his opinion the welfare of the country requires it, may return any mail to the sender.*** Concerning it the New Republic of May 18,

*Am. Journal of International Law, Supplement, vol. XII, no. 1, January 1918, page 54-55.

**Times C.H.M., Nov. 1917, p. 234.

***The Nation, May, 1918, vol. cvi, No. 2759, p. 583.

1918, publishes the following editorial comments: "The bill has established a censorship of opinion in this country as drastic as any censorship can well be. Its provisions are vague and comprehensive, and bestow on the government during the war the power to suppress practically any criticism which an administrative official can plausibly consider harmful to the American cause or likely to bring American institutions into disrepute." These provisions, in the opinion of the editor, "embody every principle in respect to the coercion of opinion which the Constitutional safeguard was supposed finally to have excluded from American law."

An editorial in the Independent (the espionage act was passed May 7) after describing certain censorship methods under the earlier acts, contains the following rather strong language: "Such are the methods by which the Washington Bureaucracy retains the helm. ... Emperor Woodrow Wilson keeps his hold on the army, the spy service and the Federal Courts."* The sane and conservative Nation in its issue for May 18 says: "Thirty-nine hundred convictions obtained by the Department of Justice under existing laws against disloyalty are a commentary upon the need for a new Sedition Bill. ... What is certain is that it puts arbitrary power into the hands of the Postmaster-General to render incommunicado "any person or concern" by refusing to deliver addressed mail upon "evidence satisfactory" to the Postmaster-General. ... It is for the President to decide whether we stand in need of arbitrary measures such as neither England nor France has found it necessary to adopt."**

*The Independent, May 11, 1918, vol. IXIV, p. 239.

**The Nation, May, 1918, vol. CVI, No. 5739, p. 363.

Besides these legally endorsed powers, the President has an immense prestige as our leader in war, and this gives him certain extra-legal war powers which he understands perfectly how to use on occasion. Probably the most striking example of his exercise of such power is the price-fixing by executive proclamation, already described. But it is not only the capitalists who have felt his hand. The price of labor has been in a measure fixed in the shipping industry by the prestige of the President's office. For a time the workers in these trades were inclined to be obstreperous and strikes were common. On February 17, 1918, the President addressed the following telegram to William L. Hatcheson, who was leading a strike in the shipyards as General President of the Carpenters' and Joiners' Union of America. The telegram read in part: "All the other Unions engaged in this indispensable work have agreed to abide by the decisions of the Ship-building Wage Adjustment Board. ... Will you coöperate, or will you obstruct?"* The strike immediately collapsed.

It has been clearly evident in all the foregoing that President Wilson has been to a remarkable degree made free from the supervision of Congress in the discharge of his executive functions. This may end with the war; certainly it has been granted as a distinctly war power. But the results of a long conflict seldom pass entirely away, and if this executive freedom can be made to continue it will mark a new and desirable departure in American government. The one act which above all others relieves the executive from Congressionally specified rules and regulations,

*Chicago Tribune, February 18, 1918.

is the Overman Act. Until this act was passed the organization of the executive machinery - the burcausand departments and commissions that carried on the work of the executive branch - had been arranged and prescribed by Congress. That body thereby not only told the President what to do, but went into great detail as to how he should do it. The Overman Bill ends that for the period of the war at least. The act was approved May 20, 1918. Under its provisions "Broad powers to reorganize and consolidate executive departments and other executive agencies" are given. The President is required to organize a special department to carry on the air-craft business, which he did by executive order on the day he signed the bill.*

This concludes the account of the extraordinary powers which in the course of one year and one month have been delegated to President Wilson for the more efficient conduct of the war.

* The Official Bulletin, May 21, 1918.

CHAPTER FOUR

COMPARISONS AND CONCLUSIONS

The following is a summary of the outstanding similarities and contrasts between the war powers of President Lincoln and President Wilson.

First of all, President Wilson has abided much more closely by the letter and spirit of the Constitution. Historians do not question much that Lincoln, urged on by a desperate situation, disregarded the Constitution, as I have indicated. It may be urged in his defense, as he himself pointed out, that an insurrection within the United States itself, with the bonds of order and government dissolving around him, justified extraordinary measures. Nevertheless, he who would plead expediency for violating the Constitution has need to show an overwhelming case. And it is reasonably clear that in the case of arbitrary arrests, at least, Lincoln's acts did his cause no perceptible good.

On the other hand, the Wilson administration will someday have to justify some of its acts at the bar of history. One should note that the executive has in all doubtful cases first obtained the authority of an act of Congress to go upon. Unlike Lincoln, arbitrary and perhaps unconstitutional acts are always "by the authority vested in me by the act of Congress." But it cannot so escape responsibility. It performed the acts, and, for the most part, it recommended the laws by which they were permitted. There have been no arbitrary arrests. But the interference with the freedom of speech, which has been described, will have to stand review someday in the light of the first article of the Amendments to the Constitution, which reads: "Congress shall make no law respecting an establishment of religion,

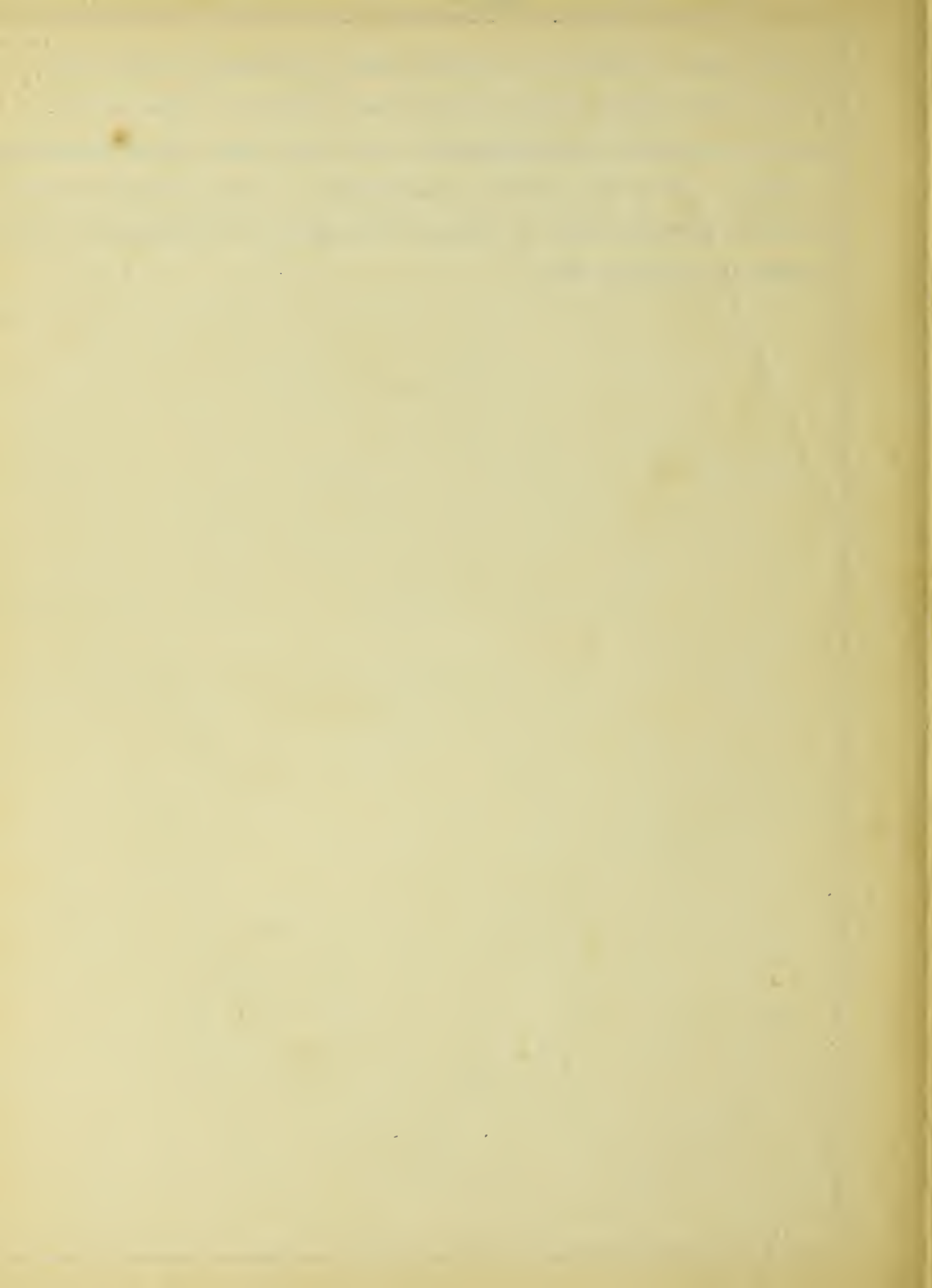
or abridging the freedom of speech or of the press." The first item of American freedom is untrammelled religion. The second is free speech and a free press. One of the questions upon which this paper hoped to throw light was the capacity of democracy to develop efficiency, as revealed by its conduct in time of war. It is necessary to conclude that in order to obtain warlike efficiency, democracy in the past has ceased to be democracy during periods of war. The temptation to secure the efficiency of absolutism by the methods of absolutism has in certain cases been too strong. It is extremely important, however, that in the case of Lincoln, upon which time has had opportunity to pass a matured judgment, it does not appear that the clearly undemocratic methods really increased efficiency. The suppression of free-speech in particular seems to have raised up much more opposition than it quelled. Democracy is entirely consistent with great concentrations of power -- power that is made free from really hampering restraints. It is not consistent with arbitrary power. The people must be left free to speak. And in the past, attempts to graft the methods of absolutism upon democratic stock have not increased efficiency.

One of the most interesting contrasts between the powers of the two war-Presidents is in the huge increase of President Wilson's power over business and industry. There has been a steady increase of government interference in business since Lincoln's time represented by the Interstate Commerce Commission, the Federal Reserve Board, the Federal Trade Commission and the Newlands Arbitration Act of 1913. A modern war is largely a problem in social organization. The fact that we have passed through a war is going to call our attention sharply to the resources of social organization. Stern necessity is compelling us to free our minds from many old prejudices and timidi-

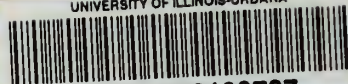
ties, and adopt the most efficient social mechanisms and devices that social or political scientists can suggest. They are efficient, that is to say, from the point of view of the general public. In a certain sense, society has always been efficiently organized. The Steel Trust was efficient. The railroads were efficient, very much more efficient than they are today,- in working out the profit of their owners. The efficiency of social organization in this country has been too much for the benefit of the organizers. The war is forcing upon us a grand overhauling of our whole economic system, to organize it for the benefit of the nation as a whole. If the war can commit the United States to that program, it will not only have made the world safe for democracy but it will have made democracy efficient at home. This is one of the most significant possibilities of President Wilson's greatly increased powers over business, industry and commerce.

A third interesting difference between the two Presidents is in their relations to Congress. Congress would not, to any very great extent, follow Lincoln. It would vote him war powers when in its own judgment they were necessary, but when the executive tried to steer legislative policy there was great resentment, even among the members of his own party as has been shown. This was partly due to a thorough distrust of the members of Lincoln's cabinet. But Congress has been ready to follow the suggestions of President Wilson to a surprising extent. For one thing, the organization of the Democratic party is closer and of longer standing than was the organization of the Republican party in 1861, which makes the modern Democratic majority easier to discipline. For another, the people and Congress are used to a broad construction of the Constitution, as they were not in Lincoln's time. Furthermore, the precedents set by

Lincoln made it easier for Congress and the country to see that great powers are properly given to the executive in time of war. Finally, since the time of Lincoln, the people have had an increasing tendency to hold the executive responsible for the general policies of the government begun by his bold assumption of leadership in the crises of the Civil War.



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